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31 **UNITED STATES DISTRICT COURT**

32 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

33 DEMETRICK PENNIE, RICK ZAMARRIPA

34 Plaintiffs,

35 v.

36 TWITTER, INC., GOOGLE INC.,
37 FACEBOOK INC.,

38 Defendants.

39 Case No. 3:17-CV-00230-JCS

40 **REPLY MEMORANDUM IN SUPPORT
41 OF MOTION OF DEFENDANTS
42 TWITTER, INC., GOOGLE INC., AND
43 FACEBOOK, INC. TO DISMISS THE
44 AMENDED COMPLAINT PURSUANT TO
45 FED. R. CIV. P. 12(b)(6)**

46 Judge: Hon. Joseph C. Spero

47 [Fed. R. Civ. P. 12(b)(6)]

48 Hearing Date: Aug. 25, 2017

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MISCELLANEOUS

Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) *passim*

1 Plaintiffs' Opposition ("Opp.") leaves no doubt that they want to hold Defendants liable
2 for a terrible incident of violence based solely on the ground that some of Defendants' billions of
3 users allegedly were able to post violent and/or objectionable material on Defendants' online
4 platforms. While Defendants have profound sympathy for the victims of this crime, the law does
5 not permit Plaintiffs' theory of liability. Plaintiffs' claims are barred by 47 U.S.C. § 230 and fail
6 to meet the substantive requirements of the Anti-Terrorism Act ("ATA") and state tort law.

7 **I. PLAINTIFFS CANNOT EVADE SECTION 230'S ROBUST IMMUNITY**

8 As Defendants have shown, § 230 bars claims that seek to hold an online service provider
9 liable as a "publisher" with respect to third-party content. Plaintiffs do not dispute that
10 Defendants are providers of "interactive computer service[s]" or that the allegedly unlawful
11 content at issue was supplied by third parties. The theories they do offer in an effort to evade
12 § 230 all fail. *First*, an uncodified statement of purpose in the recently enacted Justice Against
13 Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) ("JASTA"), did not
14 impliedly repeal or "nullify" § 230. *Second*, despite Plaintiffs' attempt to characterize
15 Defendants' conduct as providing communication "functionality" and "account reconstitution,"
16 their claims still seek, impermissibly, to impose liability on Defendants as publishers. *Third*,
17 clear case law applying § 230 defeats the theory that Defendants' alleged juxtaposition of third-
18 party ads next to other third-party content made them providers of allegedly unlawful content.

19 **A. JASTA Did Not Impliedly Repeal Or Abrogate Section 230**

20 Plaintiffs first argue, without citing any authority, that Congress somehow "nullifie[d]"
21 § 230 when it enacted JASTA last year. Opp. 3-4. Plaintiffs are incorrect.

22 "It is 'a cardinal principle of statutory construction that repeals by implication are not
23 favored.'" *United States v. 493,850.00 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008);
24 *accord Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (court will not infer a statutory repeal
25 "unless the later statute 'expressly contradict[s] the original act'"). An implied repeal may be
26 found only where two statutes "are in 'irreconcilable conflict,' or where the latter act covers the
27 whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538
28 U.S. 254, 273 (2003); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two

1 statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed
2 congressional intention to the contrary, to regard each as effective.”). “[I]n either case, the
3 intention of the legislature to repeal must be clear and manifest.” *Radzanower v. Touche Ross &*
4 *Co.*, 426 U.S. 148, 154 (1976); *accord Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551
5 U.S. 644, 662 (2007).

6 No such manifest intent or irreconcilable conflict is present here. Although JASTA made
7 two specific amendments to *other* pre-existing statutes—the Foreign Sovereign Immunities Act
8 (“FSIA”) and the ATA—it did not amend (or even reference) the immunity created by § 230 or
9 address in any way the activities of online service providers. Nothing in JASTA’s text or history
10 suggests any intent to override the established immunity that § 230 has provided for two
11 decades—one that has repeatedly been “understood to merit expansion … into new areas.”

12 *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014). The operative
13 provision of JASTA at issue, codified at 18 U.S.C. § 2333(d), states only that, under certain
14 circumstances involving a defined act of international terrorism, “liability *may be asserted* as to
15 any person who aids and abets … or who conspires with the person who committed [the] act,”
16 *id.* (emphasis added). It does not say that liability is *assured*—for example, by providing for
17 liability “notwithstanding” existing immunities or defenses, including that provided to online
18 service providers. *Cf. PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621-22 (2011) (describing absence
19 of “*non obstante*” provision as indication that legislature did not intend a repeal by implication).

20 Congress’s silence about § 230 in enacting JASTA is particularly significant because the
21 Act expressly—but only partially—curtailed a different immunity: namely, foreign sovereign
22 immunity under the Foreign Sovereign Immunities Act (“FSIA”) for certain acts of international
23 terrorism. *See* JASTA § 3(a) (negating sovereign immunity for acts of terrorism in the U.S.).
24 JASTA’s partial repeal of the FSIA powerfully suggests that Congress meant to abrogate only
25 that one immunity, not surreptitiously to repeal other statutory immunities nowhere mentioned in
26 the text of the act or in the extended debates about its passage. Plaintiffs’ reading would not only
27 render superfluous JASTA’s express (but partial) repeal of one immunity; it would also
28 improperly override the careful lines Congress drew in effecting that partial repeal.

1 Applying JASTA as written also creates no “irreconcilable conflict” with § 230. *Branch*,
2 538 U.S. at 273. JASTA permits secondary liability under the ATA in appropriate
3 circumstances, but where such claims seek to hold online service providers liable for publishing
4 third-party content, § 230 immunity continues to apply, just as it does to any other type of claim.
5 This is how statutory immunities always work: one statute creates potential liability, and the
6 immunity shields a defined class from that liability. In *Hui v. Castaneda*, 559 U.S. 799 (2010),
7 for example, the Supreme Court rejected an argument that a later-enacted liability statute
8 impliedly repealed an existing immunity, reasoning that no “irreconcilable conflict” was created
9 by the mere fact that the older “more comprehensive immunity” would protect some defendants
10 from liabilities created by the new law. *Id.* at 809-10.

11 The same reasoning governs here. Courts routinely apply § 230 to immunize service
12 providers against claims arising under other federal statutes—including *later*-enacted statutes.
13 See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 22-23 (1st Cir. 2016) (§ 230 barred claims under
14 Trafficking Victims Protection Reauthorization Act of 2008), *cert. denied*, 137 S. Ct. 622 (2017).
15 Most directly on point is *Cohen v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 76701 (E.D.N.Y. May
16 18, 2017), which applied § 230 to dismiss claims brought under JASTA—in the face of the same
17 implied-repeal argument Plaintiffs make here. See Opp. to Mot. to Dismiss at 27 n.6, *Cohen v.*
18 *Facebook, Inc.*, No. 16-04453 (Jan. 13, 2017), ECF No. 29. This Court should do the same.

19 Plaintiffs’ argument is especially weak because it relies not on JASTA’s substantive
20 provisions, but instead on the uncodified findings and statement of purpose that preface the
21 legislation. Opp. 3-5 (citing JASTA § 2(a)(6), (b)). It is well settled that such hortatory
22 preambles are not law unto themselves, and do not change the scope of the operative provision of
23 a statute—much less effectuate implied repeals of pre-existing and operative federal laws. See
24 *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009); accord *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (“prefatory clauses or preambles cannot
25 change the scope of the operative clause”). And in any event, although JASTA’s statement of
26 purpose expresses a broad goal of combatting terrorism, it says nothing about online service
27 providers, much less about abrogating existing immunities applicable to them. Nothing in the
28

1 statement of purpose or findings provides any suggestion—much less a “clear and manifest”
2 indication (*Hawaii*, 556 U.S. at 175)—that Congress meant to effect a significant change in U.S.
3 law by eliminating the established protections that § 230 provides for online intermediaries.¹

4 **B. Section 230 Bars Plaintiffs’ “Functionality” Theory**

5 Plaintiffs’ next theory—that their claims focus not on publishing third-party content but
6 on the provision of “proprietary functions,” such as “allow[ing] … accounts to reconstitute”
7 (Opp. 20-21)—also fails. “[W]hat matters” for § 230 immunity is not the “label[]” placed on the
8 claim but “whether the cause of action inherently requires the court to treat the defendant as the
9 ‘publisher or speaker’ of content provided by another.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096,
10 1101-03 (9th Cir. 2008). This is not a new issue, as Plaintiffs suggest. Opp. 19. On the
11 contrary, courts have repeatedly—and uniformly—held that an online platform’s provision of
12 accounts (i.e., functionality) to users is publishing-related conduct protected by § 230. That is
13 true both in ATA cases—*see Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 970-74 (N.D. Cal.
14 2016) (“*Fields I*”); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-27 (N.D. Cal. 2016)
15 (“*Fields II*”); *Cohen*, 2017 U.S. Dist. LEXIS 76701, at *28-31—and in other contexts, *see*
16 *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-22 (1st Cir. 2007); *Doe v.*
17 *MySpace, Inc.*, 528 F.3d 413, 421 (5th Cir. 2008). As these cases explain, § 230 bars such
18 theories because they seek to penalize a protected publishing decision: “the decision to permit
19 third parties to post content.” *Fields I*, 200 F. Supp. 3d at 972.

20 Plaintiffs insist that Defendants could have prevented accounts from reconstituting in a
21 “content-neutral” manner by barring “the incremental naming of accounts which have been taken
22 down” and “request[ing] friends/followers in bulk.” Opp. 21. But even if those strategies truly
23

24 ¹ Plaintiffs mistakenly assert that “[n]o part of § 230 relied upon Constitutional principles.”
25 Opp. 4. In enacting § 230, “Congress wanted to encourage the unfettered and unregulated
26 development of free speech on the Internet,” and the immunity protects important First
27 Amendment principles in ensuring that online platforms are not held liable for disseminating
28 user expression. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). Plaintiffs further err in
suggesting § 230 does not apply because their claims reference federal criminal statutes. Opp.
19 n.7. Courts have uniformly rejected that argument, holding that § 230’s exception for
“enforcement” of any “Federal criminal statute,” 47 U.S.C. § 230(e)(1), does not apply to civil
claims that derive from federal criminal statutes. *E.g., Backpage.com*, 817 F.3d at 23; *Doe v.*
Bates, 2006 U.S. Dist. LEXIS 93348, *8-12 (E.D. Tex. Dec. 27, 2006).

1 were content neutral—which they are not²—that would make no difference. Because a service
2 provider’s “choices as to who may use its platform are inherently bound up in its decisions as to
3 what may be said on its platform,” any “attempt to draw a narrow distinction between policing
4 accounts and policing content must ultimately be rejected.” *Cohen*, 2017 U.S. Dist. LEXIS
5 76701, at *29. Contrary to Plaintiffs’ suggestion (Opp. 19), § 230 does not turn on whether an
6 editorial strategy would require the service provider to make content-based decisions about user
7 material. So long as the objective of a proffered strategy is to control who can publish or under
8 what terms, § 230 bars claims based on a provider’s decision not to adopt that strategy. *Lycos*
9 and *MySpace* make that clear, applying § 230 to claims premised on intermediaries’ failure to
10 employ supposedly content-neutral strategies, such as barring users from having multiple screen
11 names, *Lycos*, 478 F.3d at 420, and using age-verification tools, *MySpace*, 528 F.3d at 421-22.
12 The same is true here: holding Defendants liable because they supposedly failed to block users
13 from using certain account names or communicating with other users in certain ways would
14 penalize them for protected publisher activities.³

15 Plaintiffs’ theory also would defeat a core objective of § 230: “to encourage interactive
16 computer services and users of such services to self-police the Internet for obscenity and other
17 offensive material.” *Batzel*, 333 F.3d at 1028. Plaintiffs assert that, whenever Defendants
18 “voluntarily” “chose[] to delete an account,” they thereby “assumed responsibility” for any user
19 action to “reconstitute” that account. Opp. 20-21. But that theory—that a service provider’s
20 self-policing efforts become the basis for holding it liable for user behavior—is exactly what
21

22 ² Beyond the fact that the posited strategies would require Defendants to decide what content
23 may be posted, including by making assessments about “suspicious conduct” by users (Opp. 21),
24 the entire premise of Plaintiffs’ claims is an asserted connection between objectionable content
25 allegedly posted on Defendants’ platforms and Micah Johnson’s crimes in Dallas. Absent the
alleged effect of that third-party content, Plaintiffs’ claims against Defendants have no
conceivable basis. *Fields II*, 217 F. Supp. 3d at 1124-25; *see also infra* n.3.

26 ³ Plaintiffs’ attempt to focus on the alleged *consequences* of third-party content, such as “new
recruits” (Opp. 20), also fails. Such a claim just as much seeks to hold the platform liable as
27 publisher—and is just as much barred—as one premised overtly on the content of that material.
Here, for example, Plaintiffs’ theory is that Defendants “provide[d] personnel to HAMAS” as a
28 result of allegedly “giving HAMAS the means to post, save, and distribute videos and other
messages.” *Id.* That theory is plainly content-based.

1 Congress sought to overturn in enacting § 230. *See Jones*, 755 F.3d at 408 (§ 230 “set out to
2 abrogate” precedent holding a service provider liable “because it had engaged in voluntary self-
3 policing of … third-party content”); *Batzel*, 333 F.3d at 1029-30 (same).

4 **C. Targeting Advertising Does Not Make Defendants Content Providers**

5 Likewise without merit is Plaintiffs’ argument that § 230 does not apply because
6 Defendants supposedly act as “information content providers” by “targeting ads” and displaying
7 “composite content.” Opp. 21-23. As already explained (Mot. 11-12), a service provider does
8 not “develop” content merely by “augmenting the content generally,” *Fair Hous. Council v.*
9 *Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008)—even where (unlike here) it
10 “has an active, even aggressive role in making available content prepared by others,” *Blumenthal*
11 *v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998). A provider loses immunity only “if it
12 contributes materially to the alleged illegality of the conduct.” *Roommates*, 521 F.3d at 1168.⁴
13 No such facts are alleged here. Not only were the ads themselves third-party content, but
14 Plaintiffs do not even suggest that they were objectionable or contributed to the alleged illegality
15 of any terrorist content at issue. Indeed, Plaintiffs admit that Defendants’ use of targeted ads
16 applies across their platforms and has no special connection to terrorism or to Plaintiffs’ ATA
17 claims. *See, e.g.*, FAC ¶ 91. The use of “neutral tools” to place ads alongside third-party
18 material, *Roommates*, 521 F.3d at 1171, does not defeat § 230 protection.⁵

19

20 ⁴ Plaintiffs’ brief (Opp. 22-23) misreads this and other case law. The court in *Blumenthal*
21 expressly rejected the argument that § 230 protection is limited to “passive conduit[s],” and held
22 AOL immune even though it had solicited, paid for, and “affirmatively promoted” the allegedly
23 defamatory third-party content. 992 F. Supp. at 51-52. In *MCW, Inc. v. Badbusinessbureau.*
24 *com, LLC*, 2004 U.S. Dist. LEXIS 6678, at *32 (N.D. Tex. Apr. 19, 2004), the court held the
25 defendants acted as “information content providers” because they themselves had supplied titles
and headers that were themselves defamatory. By contrast, the ads here were created by third
parties and are not alleged to be unlawful. Finally, the aspect of *Roommates* on which Plaintiffs
rely involved a service provider that had designed its service to require users to submit content in
violation of federal law and then made “aggressive use” of that illegal content in conducting its
business. 521 F.3d at 1172. No such allegations are present here.

26 ⁵ Plaintiffs argue that Google is not immune insofar as it allegedly shared advertising revenue
27 with users who posted Hamas-related videos. Opp. 23-24. Here again, Plaintiffs cannot explain
28 how a neutral revenue-sharing policy (FAC ¶¶ 93-98) materially contributes to the illegality of
terrorist content. Plaintiffs cite *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), but the
conduct there—where the service “solicited requests for confidential information protected by
law” (*id.* at 1201)—is worlds away from what is alleged here. And Plaintiffs’ other cases make

1 **II. ALL OF PLAINTIFFS' CLAIMS FAIL ON THEIR OWN TERMS**

2 **A. Plaintiffs Cannot Show Proximate Causation**

3 As argued in Defendants' opening brief, Plaintiffs' attenuated theory of causation comes
4 nowhere close to causally linking their injuries to any alleged misconduct by Defendants. Mot.
5 15-19. The Opposition does not even try to explain how Johnson's crime—or even his alleged
6 engagement with social media content posted by "black separatist hate groups"—proximately
7 resulted from any alleged misconduct by Defendants related to the alleged use of their platforms
8 by persons affiliated with Hamas. Plaintiffs offer only a strained analogy, positing a scenario in
9 which Smith gives a gun to Jones who leaves it to be found by Billy who, in turn, shoots
10 Tommy. Opp. 16-18. That anecdote does not support Plaintiffs' convoluted causation theory
11 and only underscores what is lacking here. Providing an online platform that can be used to
12 share information about any conceivable issue is not remotely like giving a child a loaded gun.
13 Like all tools, online platforms can be misused, but that does not mean Defendants peddle in
14 "dangerous instrumentalit[ies]," *Pratt v. Martineau*, 870 N.E.2d 1122, 1128 (Mass. App. Ct.
15 2007), much less that they assume legal responsibility merely because bad actors misuse their
16 services. This is especially so where, as here, the only alleged connection between the alleged
17 bad actors and the crime at issue is indirect, intangible, and entirely speculative.

18 Plaintiffs erroneously invite the Court to employ a looser causation standard used by
19 some out-of-circuit courts construing claims under the ATA. Opp. 15-16. As Defendants have
20 shown (Mot. 16, n.3), that approach ignores both the text of the statute and the weight of
21 authority, including a recent decision in this district squarely holding that the ATA's "by reason
22 of" language requires a sufficiently "direct[]" relation between the defendant's alleged material
23 support and the plaintiff's alleged injury. *See Brill v. Chevron Corp.*, 2017 U.S. Dist. LEXIS
24 4132, at *20 (N.D. Cal. Jan. 9, 2017) ("[T]he proximate causation standard articulated by the
25 Second Circuit in *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013) ... is well-reasoned and

26
27 clear that simply paying users for content does not fall outside § 230. *Blumenthal*, 992 F. Supp.
28 at 51-52. In any event, Plaintiffs' cursory allegations fail on their own terms. They make no
 plausible allegation that Google actually shared revenue with Hamas—much less that it did so
 knowingly or that any such hypothetical sharing had any connection to the Dallas shooting.

1 compelling, and the Court applies it here.”). Plaintiffs’ focus on “foreseeability” (Opp. 15-16)
2 also flies in the face of recent Supreme Court authority confirming that “foreseeability alone
3 does not ensure the close connection that proximate cause requires.” *Bank of Am. Corp. v. City*
4 *of Miami*, 137 S. Ct. 1296, 1306 (2017).⁶

5 In any event, Plaintiffs’ claims still would fail even if a looser causation standard were
6 used. Plaintiffs allege no facts that plausibly could show that Defendants’ “actions were ‘a
7 substantial factor in the sequence of responsible causation.’” Opp. 15 (quoting *Strauss v. Credit*
8 *Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013)). Nothing in the FAC suggests that
9 Defendants’ allegedly imperfect efforts to police their services against use by terrorists were a
10 substantial factor leading to Johnson’s crime. *See, e.g., Ahmad v. Christian Friends of Israeli*
11 *Cmty.*, 2014 U.S. Dist. LEXIS 62053, at *13-14 (S.D.N.Y. May 5, 2014) (no proximate cause
12 based on alleged transfer of funds to a large group, some of whom eventually committed terrorist
13 attacks), *aff’d*, 600 F. App’x 800 (2d Cir. 2015); *Brill*, 2017 U.S. Dist. LEXIS 4132, at *20
14 (rejecting attenuated causation allegations). As in *Fields*, Plaintiffs’ alleged chain of causation is
15 far “too speculative [and] attenuated to raise a plausible inference of proximate causation.”
16 *Fields I*, 200 F. Supp. 3d at 974 n.4; *Fields II*, 217 F. Supp. 3d at 1127 n.3. This flaw defeats not
17 only Plaintiffs’ direct liability claims under the ATA, but also their state law claims, which
18 similarly require a showing of proximate cause.

19 **B. Plaintiffs Cannot Save Their Secondary Liability ATA Claims**

20 Plaintiffs’ Opposition likewise confirms that their claims under § 2333(d) for aiding and
21 abetting and conspiracy must be dismissed. This is so for several independent reasons.

22 *First*, Plaintiffs’ Opposition does nothing to establish that the act from which their
23 injuries arose—a shooting in Dallas—constituted “international terrorism” as defined in the
24 ATA, 18 U.S.C. § 2331(1)(C), and as required to state a claim under the ATA, *see* § 2333(a), (d).

25

26 ⁶ Plaintiffs further err in arguing that JASTA’s “findings” impliedly relaxed the ATA’s
27 causation requirement. Opp. 4. JASTA did not amend the “by reason of” language in Section
28 2333(a) and did not purport to alter the causation analysis this phrase has long been understood
to require. And in any event, as shown above, the findings and preamble cannot expand or alter
the operative terms of the statute, which continues to mandate the “by reason of” standard.

1 Plaintiffs do not dispute that the shooting was purely domestic, having been carried out in Texas
2 by a U.S. citizen born in the United States, against victims who also were U.S. citizens. FAC ¶¶
3 1, 8-9, 123. And although Plaintiffs try to cast their claims as involving actions by Hamas that
4 “transcend national boundaries” (Opp. 6), they do not show how their allegations about *this*
5 *incident* transcended national boundaries as required by the statute. § 2331(1)(C). They do not
6 allege that the “means” by which Johnson committed his attack involved any communication
7 with any international terrorist group; that the persons he apparently intended to “intimidate or
8 coerce” were outside the United States; or that he “operate[d]” or sought asylum overseas. *See*
9 *id.* Rather, they contend that he was “radicalized” in the U.S. by viewing content from U.S.-
10 based “black separatist hate groups.” FAC ¶¶ 129, 132.

11 *Second*, Plaintiffs allege no facts that would establish that a designated foreign terrorist
12 organization “committed, planned, or authorized” the Dallas attack, as § 2333(d) requires.
13 Plaintiffs’ conclusory and unsubstantiated statements to the contrary (Opp. 2, 5-6, 11)—all of
14 which rest on allegations that Hamas propaganda influenced “black separatist hate groups” (FAC
15 ¶¶ 132, 139-142), who in turn created other propaganda that allegedly caused Johnson to be
16 “radicalized” (FAC ¶¶ 122, 130-131)—are not remotely sufficient. Section 2333(d) does not
17 permit claims for attacks merely (and indirectly) inspired by a terrorist group’s online postings.
18 Instead, its plain language requires direct and advance participation by the FTO in the specific
19 attack at issue. This failure alone defeats Plaintiffs’ claims.

20 *Third*, Plaintiffs ignore the requirement of § 2333(d) that the defendant have conspired
21 with—or have knowingly provided substantial assistance to—the specific “person” who
22 “committed” the alleged act of international terrorism. § 2333(d)(2). Plaintiffs do not dispute
23 that that person is Johnson (FAC ¶¶ 1, 123), yet they do not even try to show that Defendants
24 knowingly assisted or entered into any agreement with him. Plaintiffs do not mention Johnson in
25 trying to defend their conspiracy claim, and mention him only once in connection with their
26 aiding and abetting claim. And although they allege that Johnson made “use of Defendants’
27 platforms” to “‘lik[e]’ pages calling for the murders of police officers” (Opp. 9-10), they do not
28 and cannot suggest that this alleged use constituted “substantial assistance” knowingly provided

1 by Defendants to Johnson in the commission of his crimes. Nor can Plaintiffs avoid this problem
2 by suggesting that the availability of Defendants' platforms provided assistance to Hamas, such
3 that Defendants supposedly assisted in "Hamas's ongoing engagement in international terrorism"
4 and had a "tacit agreement [with] Hamas" (Opp. 8-11)—which connections in some inexplicable
5 way inspired Johnson to shoot police officers in Dallas. Even if all of that could be alleged, it
6 would not be enough under § 2333(d) because it would not establish that Defendants knowingly
7 provided substantial assistance to Johnson himself.

8 *Fourth*, Plaintiffs fail to establish the key elements of aiding and abetting—namely, that
9 Defendants acted with knowledge of a specific illegal scheme and knowingly assisted the
10 principal violation. Opp. 7 (citing *Halberstam v. Welch*, 705 F.2d 472, 477, 488 (D.C. Cir.
11 1983)).⁷ At most, Plaintiffs argue that Defendants made their services widely available to
12 billions of users, while being generally aware that some attempting to use their services may
13 have been affiliated with Hamas. Opp. 8. That is not enough to meet the *mens rea* required for
14 aiding and abetting liability for Johnson's crime. *E.g.*, *Nigerian Nat'l Petroleum Corp. v.*
15 *Citibank, N.A.*, 1999 U.S. Dist. LEXIS 11599, at *25-26 (S.D.N.Y. July 29, 1999) (liability
16 "require[s] actual knowledge of the primary wrong" by the defendant").

17 Likewise, "[it] has long been recognized that substantial assistance means more than just
18 a little aid, and requires knowledge of the illegal activity that is being aided and abetted, a desire
19 to help that activity succeed, and some act to further such activity to make it succeed." *Goldberg*
20 *v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009). Although Plaintiffs cite *Halberstam*,
21 they try to dilute its six-factor test (Opp. 8-10) and also ignore its clear requirement that an aider
22 and abettor must act in some deliberate way to help the actual perpetrator. *See* 705 F.2d at 484,
23

24 ⁷ In *Halberstam*, the court found that the defendant had "general awareness" of her role in the
25 illegal criminal scheme because she not only lived for five years with the individual (Welch)
26 who carried out that scheme, but also witnessed ongoing and direct evidence of his criminal
27 behavior. 705 F.2d at 486-88. Here, by contrast, Plaintiffs have not alleged that Defendants, "at
28 the time" they provided their services, even knew about Johnson at all, much less that they had
some sort of "awareness" of his criminal plan. *Halberstam* also found that the defendant had
provided "knowing assistance" to the principal violation because, among other things, she acted
"as banker, bookkeeper, recordkeeper, and secretary ... in an unusual way under unusual
circumstances." *Id.* The FAC alleges no such acts of specific assistance to Johnson.

1 488 (“state of mind” factor focuses on whether the defendant had “a deliberate long-term
2 intention to participate in an ongoing illicit enterprise”). Plaintiffs do not suggest (nor could
3 they) that Defendants had any “desire” to help Johnson carry out acts of violence, that they
4 knowingly worked with Johnson over an extended period of time, or that they did anything to
5 encourage Johnson to commit the Dallas shooting. Plaintiffs’ allegations of “assistance” to
6 Hamas—several levels removed from Johnson’s actions and not remotely like the facts of
7 *Halberstam*—are insufficiently direct to state an aiding and abetting claim under § 2333(d).
8 Courts have not hesitated to reject similarly remote allegations of aiding and abetting. *See*
9 *Goldberg*, 660 F. Supp. 2d at 425 (“[D]efendant’s alleged actions in performing three wire
10 transfers for [a primary Hamas fundraiser] fail to establish ‘substantial assistance’ of the sort
11 required to support an aiding and abetting claim.”); *Ryan v. Hunton & Williams*, 2000 U.S. Dist.
12 LEXIS 13750, at *29 (E.D.N.Y. Sept. 20, 2000) (allegations of a bank’s “failing to shut down
13 the accounts sooner” does “not rise to the level of substantial assistance”).

14 *Fifth*, Plaintiffs’ conspiracy theory fails because they have not alleged an agreement with
15 Johnson (or anyone else) “to participate in an unlawful act.” *Halberstam*, 705 F.2d at 477.
16 Allegations that Defendants made their services widely available for use by the public, that
17 Defendants knew generally that some people affiliated with Hamas might try to use those
18 services, and that Defendants could have done more to prevent Hamas-affiliated users from
19 being able to post content, do not amount to “indirect evidence” of a conspiracy between
20 Defendants and Johnson. Whether conspiracy liability can ever be established with proof of a
21 “tacit” agreement (Opp. 10-11) is beside the point, because nothing Plaintiffs allege or argue
22 plausibly suggests Defendants were “willing partners” of Johnson. *Halberstam*, 705 F.2d at 486.

23 **C. Plaintiff Pennie Cannot Plead a Cognizable Injury**

24 As Defendants showed in their moving papers (Mot. 24-25), Plaintiff Pennie’s claims
25 also must be dismissed because, as a “first responder” who was neither present during the Dallas
26 shooting nor a close relative of any victim, he does not and cannot allege a cognizable injury.
27 *See* FAC ¶ 137. Controlling Texas law defeats Pennie’s argument (Opp. 24-25) that his arrival at
28 the scene soon after the shooting affords him a basis to sue. *See Uni. Servs. Auto. Ass’n v. Keith*,

1 970 S.W.2d 540, 541-42 (Tex. 1998) (denying mother's claim even though she arrived at the
2 scene immediately after auto accident and heard her daughter crying out from inside wreckage).

3 Texas law also bars Pennie's contention (Opp. 25) that he meets the "closely related"
4 requirement for bystander claims as a "co-worker and close friend" of some of the individuals
5 shot by Johnson. *See Hinojosa v. S. Tex. Drilling & Expl., Inc.*, 727 S.W.2d 320, 324 (Tex. App.
6 1987); *Garcia v. San Antonio Hous. Auth.*, 859 S.W.2d 78, 81 (Tex. App. 1993) (limiting
7 recovery to "relatives residing in the same household, or parents, siblings, children, and
8 grandparents of the victim"); *Kiffe v. Neches-Gulf Marine, Inc.*, 709 F. Supp. 743, 745 (E.D.
9 Tex. 1989) (denying recovery to plaintiff who had only "served with [victim] in close proximity
10 aboard ship"). Pennie cites *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996), as holding
11 that "the bond between fellow police officers from the same department cannot be questioned"
12 (Opp. 25), but that case did not address whether a non-familial relationship between officers
13 allows bystander liability. *See Sherman*, 928 S.W.2d at 465-67. Plaintiffs also are incorrect that
14 under *Freeman v. City of Pasadena*, 744 S.W.2d 923, 924-25 (Tex. 1988), foreseeability alone is
15 enough. "To recover as a bystander under *Freeman*," a plaintiff must meet all three elements
16 identified in that case, which are presence, foreseeability, and a close familial relationship.
17 *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 n.6 (Tex. 1998) (denying
18 recovery to plaintiff who failed to "meet the third requirement" of familial relationship); *Keith*,
19 970 S.W.2d at 542 (plaintiff must meet all three elements).⁸

20 **D. Plaintiffs' Other ATA Arguments Are Meritless**

21 Plaintiffs devote two sections of their brief (Opp. 11-15) to discussing other defects that
22 independently bar their ATA direct liability claims but that Defendants' motion did not present
23 (in light of the many other grounds for dismissal that the motion asserted). This oddity seems to
24 stem from Plaintiffs' having copied much of their opposition from another brief their counsel
25

26 ⁸ Pennie seems to ask this Court to invent, under Texas law, a new first-responder exception
27 to the physical harm requirement for emotional distress claims. Opp. 25. Doing so would
28 violate the clear Texas rule that, "[a]bsent physical injury, the common law has not allowed
recovery for negligent infliction of emotional distress except in certain specific, limited
instances." *Temple-Insland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999).

1 recently co-filed in another case. *See Gonzalez v. Google, Inc.*, No. 16-cv-03282 (DMR) (N.D.
2 Cal. June 23, 2017), ECF No. 101. Now that Plaintiffs have opened the door, Defendants will
3 address these defects as additional grounds for dismissal of Counts III and IV.

4 **1. The FAC Fails To Allege Violations of 18 U.S.C. §§ 2339A and 2339B**

5 For direct civil liability under the ATA, the defendant itself must have committed an “act
6 of international terrorism.” *See* § 2333(a). One of the multiple elements of such an act is the
7 violation of a criminal law (*see* § 2331(1)(A))—here, the laws Plaintiffs accuse Defendants of
8 having violated are the so-called “material support” statutes, §§ 2339A and 2339B. Plaintiffs are
9 incorrect that the FAC alleges facts sufficient to satisfy the strict *mens rea* required for a
10 violation of those statutes.⁹ As to § 2339A, Plaintiffs’ reliance (Opp. 12) on *Ahmad*, 2014 U.S.
11 Dist. LEXIS 62053, is misplaced. *Ahmad* dismissed an ATA claim where the plaintiffs failed
12 plausibly to allege that the defendants “kn[ew] or intended that the support would be used [by
13 others] in preparation for, or in carrying out, violations of certain [other] federal criminal
14 statutes.” *Id.* at *7-12. As in *Ahmad*, the FAC offers no factual allegations establishing that
15 Defendants had such knowledge or intent, and its conclusory assertions are insufficient.

16 To try to establish *mens rea* under § 2339B, Plaintiffs rely on their allegations that
17 Defendants knew that Hamas is a designated FTO (Opp. 11, 13-14), but that is not enough. The
18 statute also requires a showing that the defendant knowingly provided material support to the
19 FTO. *See Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 208 (2d Cir. 2014) (“Plaintiffs
20 must show that [the defendant] *both* knew that it was providing material support to [an FTO] *and*
21 knew that [the FTO] engaged in terrorist activity.” (emphasis added)). To satisfy this latter
22 element, the defendant had to know that it was providing support directly to the organization
23 itself—that is, that the support was “coordinated with or under the direction of a designated
24 foreign terrorist organization.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31-32 (2010).

25
26 ⁹ Plaintiffs erroneously suggest that JASTA’s uncodified “findings” somehow established a
27 new “recklessness” standard for claims based on §§ 2339A and 2339B. Opp. 4. As explained
28 above (*supra* § I.A & n.6), that prefatory language cannot expand JASTA’s own terms, much
less that of other statutes that JASTA did not purport to amend, and nothing in the operative
provisions of JASTA establishes a new scienter standard. In any event, Plaintiffs have not
plausibly alleged that Defendants *recklessly* provided material support to Hamas.

1 Here, however, nothing in the FAC permits the conclusion that Defendants deliberately provided
2 support to Hamas.

3 Plaintiffs try to overcome these defects by invoking “willful blindness” (Opp. 13), a
4 doctrine that, where it applies, is a means of establishing that a party had the requisite
5 knowledge. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). It requires
6 “deliberate ignorance,” *United States v. Heredia*, 483 F.3d 913, 918 n.4 (9th Cir. 2007)—that is,
7 “active efforts” by the defendants to avoid confirming the truth of a given fact, *Global-Tech*, 563
8 U.S. at 770-71. Even if the doctrine were to apply to the material support statutes, Plaintiffs
9 cannot meet its strict test because they have not alleged, and cannot allege, that Defendants (1)
10 were actually aware of a high probability that they were providing material support to Hamas
11 and (2) made an active and deliberate effort to avoid confirming that fact. *Id.* Vague assertions
12 that Defendants generally knew that unidentified persons tied to Hamas were among Defendants’
13 billions of users (Opp. 13) are insufficient. *See Hussein v. Dahabshiil Transfer Servs. Ltd.*, 2017
14 U.S. Dist. LEXIS 11756, at *20 (S.D.N.Y. Jan. 27, 2017) (generalized knowledge of risk “is not
15 the same as knowing or deliberately-indifferent support for terror”).

16 Plaintiffs’ other cases (Opp. 13) do not hold otherwise. It was undisputed in those cases
17 that the defendants knowingly provided financial services to specific customers who were
18 involved in terrorism; the only question was whether the defendants also knew of that
19 involvement. *See Weiss*, 768 F.3d at 208; *Goldberg*, 660 F. Supp. 2d at 428. This case is
20 critically different. Defendants provide free and widely available online platforms used by
21 billions of people. Plaintiffs cannot seriously claim that Defendants know the identity and
22 affiliation of each such person, or that they “knowingly” provide support to each user. Although
23 Plaintiffs assert that unidentified accounts displayed “the emblems and symbols of HAMAS,”
24 they do not suggest that Defendants were aware of those accounts, and they admit that
25 Defendants removed Hamas accounts when it did learn about them. Opp. 14; FAC ¶¶ 55, 69, 72,
26 75. Plaintiffs offer no authority for their sweeping assertion that the provision of generalized
27
28

1 services to the public with knowledge that the services might be used in an unauthorized way by
2 some unidentified affiliate of an FTO satisfies the “material support” scienter requirement.¹⁰

3 **2. Plaintiffs Do Not Allege Other Elements of “International Terrorism”**

4 Plaintiffs also assert that any violation of the material support statutes is automatically an
5 “act of international terrorism” under the ATA. Opp. 14. Here too, Plaintiffs are incorrect.
6 Judge Donato’s recent decision in *Brill* is directly on point. The court there rejected the very
7 argument Plaintiffs make here, holding that an alleged material support violation does not, by
8 itself, satisfy the other elements of “international terrorism” required by § 2331(1), including the
9 requirement that the defendant’s conduct “appear to be intended” to achieve a specific terrorism
10 purpose. *See Brill*, 2017 U.S. Dist. LEXIS 4132, at *17-18.¹¹ The same analysis applies here.
11 Plaintiffs do not even try to explain how Defendants, simply by offering their services to billions
12 of users around the world, engaged in conduct that “appeared to be intended … to” accomplish a
13 terrorist purpose and, further, involved acts that were “violent” or “dangerous to human life.”
14 § 2331(1)(A)-(B)(i). As in *Brill*, Plaintiffs’ allegations are far removed from the kinds of
15 substantial and direct assistance to terrorists that have led courts to allow ATA claims premised
16 on material support. 2017 U.S. Dist. LEXIS 4132, at *18-20.

17 **CONCLUSION**

18 For all these reasons, as well as those set forth in Defendants’ moving papers, the FAC
19 should be dismissed without further leave to amend.

20

21 ¹⁰ Plaintiffs’ assertion that failing to stop someone’s use of an open Internet platform
22 constitutes “material support” for terrorism (Opp. 11-12), has no support, and the suggestion that
23 Defendants could be held criminally liable under §§ 2339A and 2339B simply because certain
24 users may have posted content online (despite Defendants’ efforts and in violation of their rules)
25 would raise serious First Amendment concerns. *See Mot. 18-19 & n.5; cf. Packingham v. North*
26 *Carolina*, 137 S. Ct. 1730, 1737 (2017) (First Amendment protects use of social media services).

27 ¹¹ *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), is not to the contrary. It
28 held that providing large sums of money directed to Hamas, knowing of the group’s terrorist
aims, was an act of “international terrorism.” *Id.* at 1014-15. It did not hold that every violation
of the material support laws constitutes such an act. *See Brill*, 2017 U.S. Dist. LEXIS 4132, at
*17-18. Plaintiffs’ out-of-district cases (Opp. 14) misconstrue *Boim* and disregard key
provisions of § 2331(1). And in any event, even if knowingly giving large sums of money to
known terrorist groups were “like giving a loaded gun to a child,” *Boim v. Holy Land Found.*,
549 F.3d 685, 690 (7th Cir. 2008), offering a general service to millions of people is not, even if
terrorists may be among those who might receive the service. *Id.* at 699.

1 Dated: July 14, 2017

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ATTORNEY ATTESTATION

I, Brian M. Willen, am the ECF User whose ID and password are being used to file this Memorandum. In compliance with N.D. Cal. Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other signatories.

By: /s/ Brian M. Willen
Brian M. Willen

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

By: /s/ Brian M. Willen
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